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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

File: WAC 01 214 52407 Office: CALIFORNIA SERVICE CENTER

Date: JAN 22 2003

IN RE: Petitioner:  
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center denied the employment-based preference visa and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California corporation that is engaged in the sales and distribution of computer modules. It seeks to employ the beneficiary as its president/general manager and, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition on the bases that (1) the beneficiary was not employed in an executive or managerial capacity for at least one year in the three years immediately preceding the beneficiary's entry into the United States in a nonimmigrant status, and (2) the proffered position is neither executive nor managerial in nature.

On appeal, counsel submits a brief and an organizational chart for the petitioning entity's operations. Counsel states, in part, that the beneficiary has served as the petitioner's vice president in L-1A nonimmigrant status since 1994 and as such, is qualified to be classified as a multinational executive or manager.

Section 203(b) of the Act states, in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The petitioner is a subsidiary of [REDACTED] of Taiwan. The Taiwanese parent company designs, develops, manufactures and distributes DRAM IC/modules, which enhance the performance of computers. The petitioner sells and distributes these DRAM IC/modules, employs 7 persons, and has a gross annual income in excess of \$9 million. According to the petitioner, the beneficiary is currently occupying the president/general manager

position as an L-1A nonimmigrant worker.

In the initial petition filing, the petitioner did not describe the beneficiary's job duties with the foreign entity; it merely stated that the beneficiary had been employed as the sales department manager from September 1998 until January 2001. The proffered position was described as follows:

- communicate with Parent Company on a regular basis concerning MULTIKOON'S overall business operation;
- set operation policies
- oversee MULTIKOON'S marketing and sales activities;
- direct new investment projects and marketing plans;
- make employment decisions;
- negotiate, execute and enforce purchase contracts for Parent Company and MULTIKOON in the United States; and
- public relations.

The petitioner also submitted an organizational chart for its operations, which indicated that the proffered position's responsibilities included the supervision of an accounting department manager, a sales department manager, a purchasing department manager, and a shipping and service department manager.

The director did not find that the initial evidence established the beneficiary's eligibility as a multinational executive or manager and she, therefore, requested that the petitioner submit detailed job descriptions for the foreign and U.S. positions and organizational charts for the foreign entity's and the petitioner's operations.

The petitioner responded to the director's request in a timely manner. The petitioner described the beneficiary's employment with the foreign entity as follows:

As a Sales Department Manager, the beneficiary shared [sic] about 60% of her time in reviewing sales report to determine staff promotion, hiring and firing; directing sales meeting and activities to maximize sales resources; approving and executing sales contracts; 10% of time in supervising business operation by reading reports prepared by subordinate staff; 15% of time in attending shows and seminars to get most recent trend and technologies; and 15% of her time visiting customers and vendors.

The organizational chart of the foreign entity showed that the beneficiary supervised a vice manager and two clerks in her position as the sales department manager.

Regarding the proffered position, the petitioner described it as follows:

Most of the job duties previously provided by the petitioner in its supporting letter are self-explanatory and are commonly accepted managerial duties. Specifically, as a President/CEO/General Manager, [the] beneficiary sets operation policies such as vacation policies, sick-leave policies, personnel policies, policies regarding credit extended to customers, returned merchandise authorization (RMA), etc. Furthermore, being the subsidiary's highest official, [the] beneficiary's duty to make [a] report to the parent company would be obvious and inevitable.

Also, being on the highest level of the managerial hierarchy at the U.S. entity, [the] beneficiary has the authority, and also the responsibility, to direct and oversee marketing and sales, finance and investment activities as well as hiring and firing staff are self-explanatory.

As to her role in external exposure, [the] beneficiary will represent the U.S. entity in public and negotiates and executes contracts on behalf of the U.S. entity. Since the beneficiary is the highest level managerial official, to estimate the amount of time devoted on average to any particular management job function is very difficult because the demands of the management position vary greatly week to week and project to project.

The petitioner's second organizational chart indicated that the petitioner was organized into four departments - accounting, sales, purchasing and shipping/RMA services. The chart also showed that one person each was employed in the accounting, purchasing and shipping/RMA departments, and three persons were employed in the sales department.

The director found that the beneficiary's position with the foreign entity as well as the proffered position were neither executive nor managerial in nature, and she denied the petition. Regarding the position with the foreign entity, the director concluded that the beneficiary was not a manager in this position because she did not manage other managers or professional employees. Regarding the proffered position, the director concluded, in part, that the type of business in which the petitioner is engaged "does not require or have a reasonable need for an executive . . . ." The director found that "it is contrary to common business practice and defies standard business logic for such a small company to have an executive, let alone three." The director also stated that the proffered position is, in essence, a first-line supervisory position and that the beneficiary would be

required to perform routine operational activities.

On appeal, counsel states that the director erred in finding that the beneficiary was not employed in a managerial capacity for the foreign entity because she did not supervise another managerial employee. Counsel notes that the regulation states that a manager has supervisory authority over managerial, supervisory or professional employees. Counsel contends that the beneficiary had supervisory authority over another supervisory position, which was the vice manager. Additionally, counsel states that the beneficiary could qualify as a manager because she managed an essential function of the foreign entity's operations - sales.

In responding to the director's conclusion that the proffered position is neither executive or managerial in nature, counsel states that the director conceded that the beneficiary devoted the majority of her time to executive duties, and believes that the only issue in dispute between the petitioner and the director is whether the proffered position involves "menial tasks." Counsel states that the director is not the arbiter of whether the petitioner employs enough individuals to perform the routine tasks of the organization.

Pursuant to 8 C.F.R. 204.5(j)(2):

*Executive capacity* means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

*Managerial capacity* means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (C) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. Champion World, Inc. v. I.N.S., 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir.(Wash.) July 30, 1991) (emphasis in original).

#### I. BENEFICIARY'S ROLE WITH THE FOREIGN ENTITY

The petitioner has not persuasively established that the beneficiary was employed in a managerial or executive capacity with the foreign entity. The petitioner stated that the beneficiary's duties involved attending trade shows and seminars, visiting customers and vendors, and executing job contracts. While the petitioner also indicated that the beneficiary directed sales meetings and supervised the business operations, these two activities do not appear to have been the beneficiary's primary focus. Rather, the beneficiary was largely responsible for selling the foreign entity's products. Attending trade shows, visiting customers, and executing contracts cannot be considered high level responsibilities of an executive or a manager; they are the duties of a salesperson. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593 (BIA 1988). Accordingly, the petitioner has not established that the beneficiary was employed in an executive or managerial capacity with the foreign entity for at least one year in the three years immediately preceding her entry into the United States in a nonimmigrant status. The director's decision to deny the petition on this basis will not be disturbed.

#### II. BENEFICIARY'S ROLE WITH THE PETITIONING ENTITY

When determining whether the proffered position is either an executive or managerial position, the Service looks at the

petitioner's organizational structure at the time the petition was filed. A petitioner must establish eligibility at the time of filing the immigrant petition; an immigrant petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001).

Here, the petitioner employed six individuals in addition to the beneficiary at the time the petition was filed. These individuals were in the positions of accounting, sales, purchasing and shipping. In the initial petition filing, the petitioner referred to these individuals as managers in its organizational chart. In a subsequent organizational chart, the petitioner did not identify the titles of these individuals or provide their job descriptions.

The petitioner cannot expect the Service to conclude that an individual is employed in a primarily executive or managerial capacity when it fails to specify the names or specific duties of persons supervised by the beneficiary. Cf. Republic of Transkei v. INS, 923 F.2d 175 (D.C. Cir. 1991). The actual duties of the petitioner's employees reveal the true nature of their employment, and without a listing of the duties of each employee, the Service cannot determine the petitioner's stage of development at the time the petition was filed. If the only information available to the Service is the petitioner's overall purpose (sales), the Service must conclude that the petitioner's stage of development did not require the services of an individual whose only responsibilities would be to execute primarily executive or managerial duties.

The Service takes exception to counsel's claim that the director conceded that the beneficiary executes primarily executive duties in her present position; the director's denial neither implies nor states such a conclusion. The description of the proffered position is not sufficiently specific to find that the beneficiary either directs the management of the organization, or manages the organization or an essential function of the organization as a primary job responsibility. The petitioner states that the beneficiary directs and oversees certain activities; however, the petitioner does not identify the types of duties that the beneficiary executes in order to direct and oversee functions. "Specifics are clearly an important indication

of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations." Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F. 2d 41 (2d. Cir. 1990).

It is noted that the petitioner has provided some specific examples of the beneficiary's daily activities. A review of these examples, however, reveals that such duties are neither executive nor managerial in nature. For example, the petitioner stated that the beneficiary negotiates contracts and executes public relations activities. These daily activities fall within the realm of routine sales and marketing duties; they are not managerial or executive duties. As previously stated, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, supra. No evidence in the record supports a finding that the beneficiary functions primarily as an executive or a manager in her role as vice president of the petitioning entity. Accordingly, the director's decision to deny the petition on this basis will also not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.